

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

HILLSBOROUGH, NORTH, SS.

FEBRUARY 2007

State of New Hampshire v. Michael Addison

No. 06-S-2499

**MOTION TO PROTECT INTERESTS OF THE ACCUSED IN PRIVILEGED OR
CONFIDENTIAL RECORDS**

The Accused, Michael Addison, through his Public Defenders, respectfully requests that the Court enter an order to protect his interests in privileged or confidential records which may be the subject of grand jury subpoenas by the State. The Defense has been informed that such subpoenas have been served for documents such as school records and juvenile records. These records likely contain additional privileged records such as psychological evaluations. All of these records are subject to varying privileges and rules of confidentiality. The records should not be produced to a grand jury without notice to the Defense and a finding by the Court that invasion of the privilege or confidence is justified under the law. The New Hampshire Supreme Court has specifically addressed the procedure to be followed which the prosecution seeks to subpoena privileged records before a grand jury. In re Grand Jury, 150 N.H. 436 (2004). The State has failed to follow that procedure. Thus, the Court should intervene to prevent further illegality.

FACTS AND PROCEDURAL CONTEXT

1. There is little doubt that the State of New Hampshire seeks to convict Michael Addison of Capital Murder and impose the Death Penalty. The Attorney General, Kelly Ayotte, publicly declared that the State intends to prosecute Michael Addison for Capital Murder and seek the Death Penalty. Thereafter, the State charged Michael Addison with Capital Murder in a complaint filed in Manchester District Court. The State maintained that charge in a probable cause hearing with the result that the case has been bound over to this Court for further proceedings.

2. Currently, the State is conducting grand jury proceedings to investigate its case further and to obtain a Capital Murder indictment of Michael Addison.

3. The State has indicated that it is not merely seeking a Capital Murder indictment; the State seeks a Capital Murder indictment which will support a Death Sentence and withstand subsequent challenges to imposition of that sentence. For example, in pleadings filed in this Court, the State has claimed that it has the right to present to the grand jury both "aggravating" and "mitigating" evidence relating to a Capital Murder charge. The State has further argued that it may be required to present such evidence to the grand jury in order to obtain a valid Death sentence. See "State's Objection To Defendant's Motion To Preclude The Grand Jury From Considering Certain Evidence."

4. This evidence of aggravating and mitigating circumstances, as it relates to a Capital Murder charge, is evidence of Michael Addison's character, life history and background.

5. On information and belief, the State has subpoenaed witnesses to the grand jury so that those witnesses might testify in the secret proceedings about the character, life history and background of Michael Addison. For example, representatives of the State attempted to conduct interviews of Kamari Kizer and Michelle Thomson, both relatives of Michael Addison. Mr.

Kizer was approached by a law enforcement officer and told, "We want to ask you about Mike's background." When Mr. Kizer declined to give an interview without representatives of Michael Addison being present, Mr. Kizer was promptly served with a grand jury subpoena. Michelle Thomson had a similar experience.

6. Most importantly for this motion, the State has served grand jury subpoenas duces tecum seeking production of records relating to Michael Addison's character, life history and background. For example, the State has subpoenaed records relating to a child custody and protection proceedings (RSA 169-C) in Manchester District Court, No. 003-JV-00889, 00890 (see attached order). The subpoena specifically sought "evaluations" of Michael Addison. In response to that subpoena, the Manchester District Court conducted a hearing to determine whether such records could be produced without violating any right of confidentiality. Michael Addison's court appointed counsel notified the undersigned Public Defender (Guerriero) of the hearing and the undersigned attended the hearing (with the consent of all parties and the District Court). During the hearing and afterwards, the undersigned was informed that a psychological evaluation of Michael Addison and other mental health or counseling records are contained in the files relating to the proceeding. Records pertaining to such proceedings are confidential under RSA 169-C:25 but may be released, under limited circumstances. See RSA 170-G:8-a. Moreover, even if such records were to be properly released, that procedure does not address the other issues of confidentiality and privilege such as might attach to a psychiatric or psychological evaluation (see below).

7. On information and belief, the State has also sought to subpoena other records in which Michael Addison may have a right of confidentiality. For example, counsel discovered through

mere coincidence -- not through anyone's attempt to notify counsel -- that the State has served a subpoena seeking Michael Addison's records as a student in a Massachusetts school.

8. On information and belief, Michael Addison's school records contain psychological or psychiatric evaluations (or did at one time).

LAW AND ARGUMENT

9. The extraordinary efforts of the State to punish a defendant by killing him require extraordinary attention to the fairness of the process. Unfortunately, the grand jury proceedings in this case create a substantial risk of unfairness. Despite having pre-determined the charge and sentence, the State continues the process of one-sided, secret questioning of witnesses before the grand jury. Even if this process is lawful, the process gives the State a tremendous advantage over the Defense. Any attorney in any litigation would see the strategic advantage of being able to secretly and unilaterally question key witnesses. The effect, if not the goal, of the grand jury investigation is to undermine both the adversary process and the reliability of any later factual findings. The Court should consider the State's actions in this context.

10. The State has subpoenaed privileged or confidential records without providing the Defense notice and an opportunity to be heard. Furthermore, the State has failed to justify invasion of any of the violated privileges:

11. Although the Rules of Evidence are generally inapplicable at grand jury proceedings, one exception is with regard to matters that are privileged. Privileges, such as those attaching to psychological evaluations, continue to apply during the grand jury process. Rule of Evidence 1101(c); Rule 1101(d)(2).

12. However broad and unchecked the State's powers before the grand jury may be, the State does not have the power to unilaterally decide whether or not subpoenaed records are confidential or privileged. As explained by the New Hampshire Supreme Court in In re Grand Jury, 150 N.H. 436 (2004) (a case involving medical records), when privileged or confidential records are sought, the State must make a showing before the Court that there is a "compelling justification" to invade the privilege and that the information cannot be obtained from alternative, unprivileged sources. 150 N.H. at 442-443.

13. Assuming for the sake of argument that the prosecution of the charges in this case is a "compelling justification," the State must further show invasion of the applicable privilege or confidence is justified.

14. Records of medical, psychiatric or psychological treatment are all subject to essentially the same degree of privilege. See generally Rule of Evidence 503; RSA 329:26 (regarding physicians and which contains a special exception for blood tests results but not for other evidence); RSA 330-A:32 (regarding psychologists and counselors).

15. With respect to medical, psychiatric or psychological records, In re Grand Jury requires the State to show that "it has no reasonably available alternative sources it can use at trial" to sustain its burden of proof.¹ In determining "whether a reasonable alternative source of information is available to the State for it to pursue criminal prosecution," the court should

¹ As explained by the Court, the standard at the grand jury is the same as at trial. "We recognize that circumstances may arise where alternative evidence could sustain a grand jury indictment but not withstand a motion for directed verdict because a grand jury indictment may rest entirely upon hearsay . . . and represents only the grand jury's conclusion that probable cause exists to believe the defendant committed the charged crime Even at the grand jury stage, therefore, the State's ability to access medical records must be assessed for its intended use at trial. After all, the proper purpose in securing an indictment is to pursue prosecution of an alleged crime to its conclusion. 150 N.H. at 443, citations omitted.

consider: "(1) whether the alternative evidence is admissible at trial; (2) whether the alternative evidence is sufficient to overcome a motion for directed verdict; and (3) whether the State has made adequate efforts to investigate alternative sources." In Re Grand Jury, 150 N.H. at 442-443. For present purposes, it must be emphasized these factors are to be considered by "the court" in determining whether the privilege is overcome – not the prosecution unilaterally - the "the court." In fact, "the trial court must make explicit findings and rulings on each dispositive prong of its decision to either grant or deny access to privileged medical records." 150 N.H. at 444.

16. The Supreme Court's analysis clearly presumes that the State's justification for invading the privilege will be made at a hearing after the holder of the privilege has had notice and an opportunity to be heard. Any other practice would fail to recognize society's interest in the privilege. See United States v. Sutherland, 143 F. Supp. 2d 609, 613 (D. Va. 2001). Such a procedure is also necessary for the State to make a showing that alternative sources of information have been explored. Furthermore, such minimal due process should also be required under the New Hampshire Constitution, part 1, article 15.

17. The State's failure to comply with In re Grand Jury has violated Michael Addison's rights. As noted above, the Defense has been informed that the records subpoenaed by the State contain psychiatric or psychological evaluations of Mr. Addison. The Defense was not given any notice by the State. Nor has the State made any effort, as far as the Defense knows, to justify invasion of such privileged records to the Court, as required by In Re Grand Jury.

18. The improper subpoenas threaten other privileges as well. The State should not have subpoenaed records pertaining to a child protection proceeding without giving notice to the Defense and bringing the matter before the Court. The records subpoenaed by the State are

confidential under RSA 169-C:25. Access might be permissible pursuant to RSA 170-G:8-a(II)(a)(7) if there was a prior determination of "necessity." In the absence of such a prior determination, the subpoena for the records would not be valid. Moreover, such a determination of necessity would not, standing alone, overcome other privileges attached to the records contained in the child protection proceedings. As explained by the Supreme Court, in such proceedings, the

... entire investigatory file is confidential under the Child Protection Act, *see* RSA 169-C:25, III (Supp. 1991), and any counseling and medical records contained therein are also subject to a limited privilege, *see* N.H. R. Ev. 503; RSA 330-A:19 (Supp. 1991) (psychologist-patient privilege); RSA 329:26 (Supp. 1991) (physician-patient privilege). **Thus, neither the prosecution nor the defendant had access to the DCYS file. [emphasis added]**

See State v. Gagne, 136 N.H. 101, 103 (1992). That comment in Gagne stands in contrast to the grand jury proceedings in this case, where the State seems to have presumed access to the confidential proceedings.

19. Similarly, the State has improperly subpoenaed school records from schools in Massachusetts where Michael Addison was a student (the State may also be seeking records from North Carolina, but the Defense has not received information to that effect - yet.) All states which receive federal funding for their education programs are required to keep educational records confidential under the Federal Educational Rights and Privacy Act (FERPA). See 20 U.S.C. 1232(g) (in particular, 1232(b)(1)(J) and 1232(b)(2)(A) and (B). Massachusetts does receive such federal funding and does protect student records. See 603 C.M.R. 23.07 (the relevant section of the Code of Massachusetts Regulations). This regulation allows for the production of records in compliance with a court order or "lawfully issued subpoena." Of course, in New Hampshire, a "lawfully issued subpoena" is one which complies with In re Grand Jury. In addition, the Massachusetts regulation states that the school must make "a reasonable effort to

notify the parent or eligible student of the order or subpoena in advance of compliance." As already noted, as far as the Defense knows, there has not been any attempt at notice. Just as in the case of the records of the child protection case, the Defense believes the school records in question may contain materials which are subject to additional privileges, including the privileges related to psychological evaluations.

20. While the Defense recognizes that there will be a later opportunity to move to suppress improperly obtained records, the State's efforts to obtain such records should be stopped now to prevent further irreparable harm. The effect, if not the intent, of the State's actions is to allow the prosecution the benefit of unlawful unilateral discovery while the Defense is forced to sit on the sidelines. Motions to suppress filed after the fact will not eliminate the knowledge gained by the State and will never remedy the damage to the adversarial process.

CONCLUSION

21. On December 9, 2006, almost two months ago, the Defense specifically notified the State and the Court that Mr. Addison "does not waive any legal and/or medical privilege . . regarding any . . . medical, psychological . . . or school records. . . ." See "Defendant's Motion to Prohibit The State From Using The Grand Jury Process To Elicit Mitigation Evidence To Aid The State In Preparation For The Penalty Phase." -

22. Notwithstanding this specific assertion of the relevant privileges, the State has used its power through the grand jury to seek such information.

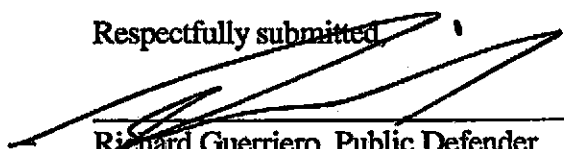
23. Considering these actions by the State and the seriousness of this case, the Court should intervene in the grand jury proceedings at this time.

24. The Court should issue an order to the State requiring it to provide notice and an opportunity to be heard to the Defense whenever privileged records are to be subpoenaed by a grand jury in any proceeding relating to the death of Officer Michael Briggs. The Court should quash all outstanding subpoenas as to which such a process has not been followed. The Court should further order the State to identify all such records which have already been examined or otherwise brought before the grand jury. The Court should then require disclosure of those portions of the grand jury proceeding so the Defense, subject to a protective order, may file motions seeking additional appropriate relief.

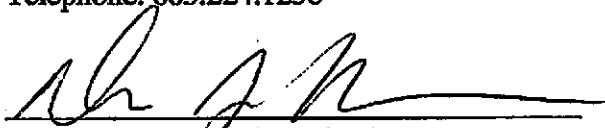
WHEREFORE, the defendant respectfully requests the following relief:

- I. A hearing on this motion;
- II. An order from the Court to the State requiring it to provide notice and an opportunity to be heard to the Defense whenever privileged records (pertaining to Michael Addison) are to be subpoenaed a grand jury hearing any evidence relating to the death of Manchester Police Officer Michael Briggs;
- III. An order quashing any outstanding grand jury subpoena, issued without notice to the Defense or prior authorization of the Court, when the subpoena request documents in which Michael Addison might claim a right of privilege or confidentiality;
- IV. An order from the Court to the State requiring the State to identify all such privileged or confidential records which have already been examined or otherwise brought before the grand jury.
- V. An order from the Court requiring the State to disclose to the Defense those portions of the grand jury proceedings at which privileged or confidential materials were discussed or examined, so that the Defense may file motions seeking additional appropriate relief.


Respectfully submitted



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was forwarded on this 7th day of February, 2007, to the Office of the Attorney General.

Richard Guerriero, Public Defender
Donna Brown, Public Defender

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.

MANCHESTER DISTRICT COURT

IN THE INTEREST OF AIDEN E.

DOCKET # 03-JV-00889 - 03-JV-00890

AMENDED ORDER

The matter is before the court on CASA's motion for this court's permission to comply with a subpoena issued by a Hillsborough County Grand Jury. Present were Attorney David Sandberg for CASA with Kathy Vachon, Casa supervisor for the CASA *guardian ad litem*, Marge Hollyburton (hereinafter GAL), Attorney Brian Goodchild for DCYF; Attorney John Schrepfer, attorney for the father; Attorney Scott Innes, attorney for the mother; and Attorney Richard Guerriero, attorney for the father in a criminal case and After inquiry by the Court, none of the parties of record objected to the presence of any party, not of record, who appeared for the hearing.

BACKGROUND

The above-captioned case commenced in this court when DCYF filed petitions pursuant to RSA 169-C alleging that Aiden was neglected (hereinafter the 169-C case). Michael Addison was named as the father in the 169-C case.

DISCUSSION

The parties informed the court of the following:

1. Michael Addison is charged with capital murder.
2. An article appeared in the Manchester Union Leader concerning Michael Addison.
3. The article identified Marge Hollyburton as the *guardian ad litem* in a child custody case.
4. The article repeated some information about Michael Addison's parenting abilities.

5. The information in the article was also contained in a court report filed by the GAL either in the 169-C case in this court or a case in Probate Court filed pursuant to RSA 170-C (hereinafter the 170-C case).
6. The Hillsborough County Grand Jury issued a *subpoena duces tecum* to the GAL requesting production of any and all records "which in any way relate to Michael Addison...including but not limited to any evaluations which were made regarding Addison's fitness to parent."

Attorney Sandberg advised the court that he did not object to providing the information requested by the subpoena. However, it was Attorney Sandberg's position that RSA 169-C:25 requires this Court to authorize the GAL to produce the records.

Attorney Schrepfer objected to the disclosure of the records to the grand jury. Attorney Schrepfer stated that there is no justification for the grand jury to have access to any juvenile files while the grand jury investigates Mr. Addison for possible criminal charges. Attorney Schrepfer states that there can not possibly be any relevance to a grand jury murder inquiry and a neglect case filed in this court. Attorney Schrepfer also stated that this court has the authority to allow certain people to inspect juvenile records but that there is no statutory authority for this Court to allow the court records to be subpoenaed by a grand jury.

Attorney Innes states that his client also objects to the records being released to the grand jury. Attorney Innes argues that the GAL reports and the GAL's file may well contain privileged information about his client and she does not want that information or any other information about her disclosed. Also, Attorney Innes stated that GAL's files may have psychological reports and other privileged information about his client that this court does not have the authority to allow disclosure of those reports. In addition, Attorney Innes argues that there appears to have been a disclosure to the media of certain information and he would not want his client subjected to the glare of media attention that accompanies high profile criminal cases.

Attorney Guerriero, who represents Mr. Addison in his criminal case, objects to the disclosure of the records to the grand jury. Attorney Guerriero states that the Attorney General did not disclose to him that the grand jury was seeking "character" evidence of his client. Attorney Guerriero argued that the Superior Court should

determine whether or not the grand jury should be allowed access to the information in the GAL's files.

As the district court is a court of limited jurisdiction with the powers conferred on it by the statutes, the court must examine the statute to determine what, if any, authority the court has to grant the motion. Woodstock Soapstone v. Carleton 133 NH 809. RSA 169-C:25 is entitled **Confidentiality** and it contains three sub-paragraphs.

Paragraph I states that the court records of proceedings in abuse and neglect cases shall be kept separate from other court files. The records shall be withheld from public inspection but open for inspection by the parties, child, parent, guardian, custodian and other authorized representatives of the child. Although section I does not define court records the plain and ordinary meaning of court records has to be those records typically kept by a court in abuse and neglect cases. Where possible a court is required to ascribe the plain and ordinary meaning of words contained in a statute. Blackthorne v. Pines 150 NH 804. However, the motion before the court is for the GAL to disclose her files. There is no request before the court to allow the grand jury access to court records. It may be that the GAL's file contains court records but paragraph I deals strictly with records that the court is required to keep.

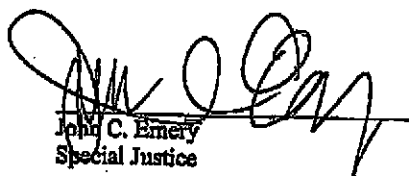
Paragraph III states that all case records, as defined in RSA 170-G:8-a, relative to abuse and neglect, shall be confidential, and access shall be provided pursuant to RSA 170-G:8-a. It seems obvious that paragraph III refers to different records than the court records mentioned in paragraph I. Clearly the legislature would not have used different names if they intended court records and case records to be the same thing.

RSA 170-G:8-a, in pertinent part, defines case records as all official records created by the department of health and human services in connection with a report received pursuant to RSA 169-C:29 or cases brought under 169-C. The statute goes on to list those records which are not case records. The statute says that records submitted to or maintained by the courts or records created by third parties, even if such records or reports are prepared or furnished at the request of the department, are not case records. The statute goes on to state that the commissioner may grant access to case records to certain parties. Interestingly, one of the parties to whom the commissioner may grant access is a grand jury, upon its determination that access to such records are necessary in

the conduct of its official business (RSA 170-G:8-a, II a, 7). By definition it appears that the records being sought by the grand jury are not case records because the GAL's records were created by a third party and not by the department. Obviously, if the grand jury wants access to case records there is a statutory scheme to gain access to these records.

However paragraph II states that it shall be a misdemeanor for any person present during an abuse and neglect hearing to disclose any information concerning the hearing that may identify a child or parent without the prior permission of the court (Emphasis added). It seems as if the legislature intended to prohibit disclosure of information concerning a hearing when the information was learned while the person was present at the hearing. It is unclear if the legislature intended to prohibit the release of information if it was learned somewhere other than at the court hearing, or if the legislature intended to limit disclosure of any information about the court hearing only by any person who attended the hearing. Could a person who attended a previous court hearing disclose information about a court hearing they did not attend? The court gave the parties the opportunity to file memoranda of law or provide other information to the court but all parties declined. It appears the only authority this court has is to allow the GAL, if the GAL was present at the hearing, to disclose any information concerning the hearing that may identify the child or parent. It is clear that the GAL was present during court hearings. It is equally obvious that the subpoenaed records contain information that may identify the child or parents. What is not clear is if the subpoenaed records contain any information concerning the hearing that the GAL learned while attending the hearing that may identify the child or parent. The CASA supervisor, Kathy Vachon, informed the court that the file would have copies of all court orders, evaluations, GAL reports, DCYF reports and other documents such as parent aide notes. However, this court does not have sufficient information before it to determine exactly what information about the hearing the GAL seeks to disclose and if the GAL acquired that information while attending a hearing and if that information may lead to the identity of the child or parent. RSA 169-C:12-b requires that all reports are to be filed at least 5 days before the hearing. Therefore, the subpoenaed records would contain information about the court hearing which may have been known prior to attending the court hearing. RSA 169-C:25, II allows this court to give permission for persons who attend court hearings to disclose information about court hearings that may identify the child or parent. The court is unable to determine if that is what CASA is seeking to do. Without that information, the court must deny the motion.

Even if this court were to grant the motion, it could only allow the GAL to disclose information as defined in RSA 169-C:25, II. There may be other statutory prohibitions preventing the GAL from producing the records and counsel might be required to seek permission from the proper authority to disclose any other information that may be restricted by statute. Also, the grand jury may have other means of obtaining the same information that they are seeking from the GAL and this order in no way prohibits them from seeking that information by other means.


John C. Emery
Special Justice

January 26, 2007